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given by consent in aid of such plan, it seems proper to look behind the decree, as the court did, to discover the true value as a going concern, in which condition the creditor preserved the assets. While there is no such attempt to improperly benefit stockholders at the expense of creditors as in the *Boyd* case, there is an attempt to inequitably benefit the creditor at the expense of the surety. Thus the decisions of the two cases seem analogous as to the effect of such a decree in a plan of reorganization where there are strong equitable reasons for disregarding it.¹⁷

PROVABILITY IN BANKRUPTCY OF CLAIMS UNDER EXECUTORY CONTRACTS. — There can be no doubt of the advantages to be gained by permitting proof against a bankrupt's estate for damages on executory bilateral contracts.¹ Where the contract has been broken by the bankrupt party before bankruptcy, it is of course clear that proof will be allowed.² But where there has been no breach before the bankruptcy proceedings, a question of great difficulty is presented. The authorities upon this point are meagre and in conflict. Recently the Circuit Court of Appeals for the Seventh Circuit allowed proof on the ground that the bankruptcy proceedings constituted an anticipatory breach of the

amount of the creditors' claims and received an amount of such stock equal in par value to one hundred per cent of their claims by the terms of the agreement, that they were estopped to deny that the paid-up stock was worth its face value and represented the actual value of the assets. The court went on the authority of the *Boyd* case. In that case the paid-up stock of the new corporation was issued of a par value far in excess of the amounts paid as assessments, and the old stockholders participating in the reorganization were given such stock in exchange for the old stock plus the assessments. In further supporting its view that the stockholders had retained a valuable interest, the court said that since it was agreed in the reorganization that the property was equal in value to the paid-up stock, the stockholders could not be heard now to assert as against the plaintiff, an unsecured creditor, that this was not true. It is hard to support this on any principles of estoppel. It is submitted that it is at most a *dictum*, and was not meant to be carried to the extreme seen in the later case.

The policy of the law is opposed to the issue of paid-up stock for less than its value. See 4 THOMPSON, CORPORATIONS, 2 ed., §§ 3904, 3911. Those subscribing who have not paid the full value may be compelled to pay the full value by creditors who have acted in reliance. *Bonâ fide* stockholders who have paid full value can complain. *Barsus v. Gates*, 89 Fed. 783. The policy of the law is also to protect the public from the danger of paid-up stock which does not represent actual capital. In the *Boyd* case the plaintiff was not in any way deceived, nor did he act in reliance upon the stock being paid-up stock. If it be assumed that the stockholders paid the actual value for the new stock, it is hard to see why public policy should dictate that they should be penalized by granting a pure benefit to the plaintiff in the form of a claim against the new corporation. Similarly, in the *Howell* case, the surety was not deceived, and invoking any theory by which the surety is given a pure benefit at the expense of the organizers would seem to be improper.

¹⁷ Apparently the doctrine of the *Boyd* case is taken to be that no objection by interested parties is necessary at the time of the decree. Whether the Supreme Court means to go to this length is doubtful in view of the fact that in the *Boyd* case the majority considered that the plaintiff was in no position to object at the time of the decree.

¹ To refuse proof is to deprive bankrupts of the full benefits of discharge, by forcing them to bear the burden of many claims which cannot be released and which will become due soon after the bankruptcy.

² *In re Silverman*, 101 Fed. 219; *In re Stern*, 116 Fed. 604; *In re Saxton Furnace Co.*, 142 Fed. 293; *In re Spittler*, 151 Fed. 942.

contract which gave rise to a fixed liability at the time of the filing of the petition. *In re Scott Transfer Co.*, Circuit Court of Appeals, Seventh Circuit, October Term, 1913. In striking contrast, a federal district court, last October, denying that bankruptcy was an anticipatory breach, refused to allow proof of the contingent claim for future damages.³

The difficulty arises through failure of the present bankruptcy act to provide expressly for the proof of contingent claims.⁴ This is probably due to a legislative oversight, for both the acts of 1841 and 1867 made provision for proof in such cases.⁵ But though the broad language of § 63, a, 4, might permit of the same construction, our judges, influenced apparently by the severity of the English courts toward contingent claims,⁶ have usually held them incapable of proof. It is true that an exception has been made in the case of a bankrupt indorser of commercial paper which was not dishonored until after bankruptcy.⁷ But the general tendency has been to hold that § 63, a, 4, is modified by the more strict language of § 63, a, 1,⁸ and that no claims are provable, unless they are fixed liabilities at the time of the filing of the petition.⁹

In order to render executory contracts provable within this construction, the courts have sought for some means by which they may hold that there is a fixed liability upon the contract at the time the petition is filed. This they have found in the doctrine of anticipatory breach. But grave difficulties at once suggest themselves when we endeavor to hold bankruptcy a breach of this nature. If bankruptcy is an anticipatory breach, why is not the trustee precluded from ever assuming performance for the benefit of the bankrupt's estate? Allowing the trustee to perform is not to be reconciled, unless we say that bankruptcy, though an actionable anticipatory violation of the contract, is not so material a breach as to give the non-bankrupt party a defense to refusing to go on with the contract.¹⁰ This, however, presents a radical, if not an unwar-

³ *In re Levy & Sons Co.*, 208 Fed. 479. In this case the claimant entered into an employment contract to serve the Levy Company for a year on a weekly salary. In the middle of the year, no breach of contract through failure to pay salary having occurred, the company became an involuntary bankrupt. It was held that no claim for damages against the estate could be proved.

⁴ The provisions of § 63, a, important for this discussion are as follows: "Debts of the bankrupt may be proved and allowed against his estate which are (1), a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him whether then payable or not . . . (4), founded upon an open account or upon a contract express or implied."

⁵ 5 U. S. STAT. AT LARGE, p. 445; 14 U. S. STAT. AT LARGE, p. 526.

⁶ For a collection of the English authorities under various acts, see a learned note in WILLISTON, CASES ON BANKRUPTCY, 491.

⁷ *Moch v. Market Street Nat. Bank*, 107 Fed. 897; *In re Gerson*, 105 Fed. 891; *In re Philip Semmer Glass Co.*, 135 Fed. 77; *In re Smith*, 146 Fed. 923. *Contra*, *In re Schaefer*, 104 Fed. 973.

⁸ *In re Roth & Appel*, 181 Fed. 667; *In re Adams*, 130 Fed. 381. The important features of this section are given in note 4, *supra*.

⁹ *In re Pettingill*, 137 Fed. 143 (guarantee of stock dividends); *Leader v. Mattingly*, 140 Ala. 444, 37 So. 270 (indemnity bond); *In re Keeton, Stell & Co.*, 126 Fed. 426 (note to pay attorneys' fees on contingency); *In re Thompson Milling Co.*, 144 Fed. 314; *In re Garlington*, 115 Fed. 999; *In re Ells*, 98 Fed. 967 (agreement in a lease providing that the lessor might reënter for default in rent and re-rent the premises, charging any loss of rental to the bankrupt); *In re Roth & Appel*, *supra*.

¹⁰ It may be asked how, if this be true, there can be a fixed liability at the time of the bankruptcy petition for damages for breach of the entire contract. The answer

ranted, extension of the doctrine of anticipatory breach as applied to ordinary contracts. For usually where courts allow an action because of an anticipatory breach the contract is treated as entirely broken. Moreover, it is ordinarily stated there must be immediate action by the injured party.¹¹ But the proving of the claim, the only action taken by the creditor, cannot in the nature of things be done immediately on the filing of the petition. Further, the courts do not consistently apply the doctrine. While bankruptcy is held an anticipatory breach of contracts of sale,¹² no case has been found under the present act in which this view was applied to an employment contract.¹³ Again, the courts are inclined to restrict the doctrine to cases where the bankruptcy proceeding is voluntary,¹⁴ thus refusing to permit proof of perhaps the majority of such contract claims.

If claims under executory bilateral contracts are to be held provable on a satisfactory basis, it must be upon the bold ground that contingent claims, if capable of liquidation,¹⁵ should be allowed proof under the present act. There seems a tendency on the part of some courts to take this view, provided the contingency is bound to occur within a year from the adjudication,¹⁶ and hence the liability to become fixed within the time named under the act for proving claims.¹⁷ But if the claim is contingent when the petition is filed, it is not rendered any the less so by the fact of becoming absolute within a year. Moreover, there would

would seem to be that under § 63, a, the question is one of fixed liability only and not of damages. Whether by virtue of later action by the trustee the damages will become payable for a mere temporary breach or for breach of the entire obligation is a question of the liquidation of the liability and not of its existence at the time of filing the petition.

¹¹ See *Johnstone v. Milling*, 16 Q. B. D. 460, 467, 473; *Zuck v. McClure*, 98 Pa. St. 541; *Dalrymple v. Scott*, 19 Ont. App. 477; WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 367.

¹² *In re Swift*, 112 Fed. 315; *In re Neff*, 157 Fed. 57.

¹³ For a decision sustaining the doctrine in an employment contract under the act of 1867 see *Ex parte Pollard*, 19 Fed. Cas. 942. The courts to-day, however, consider the bankruptcy as absolutely terminating all relations between employer and employee, leaving no duty or right of action to either party. *In re Inman & Co.*, 171 Fed. 185; *In re American Vacuum Cleaner Co.*, 192 Fed. 939. The above decisions are founded upon a like view upheld by some courts as to landlord and tenant. *In re Jefferson*, 93 Fed. 948; *In re Hays, Foster & Ward Co.*, 117 Fed. 879. It is submitted that these cases precluding the trustee from taking over the lease or contract are erroneous. *Watson v. Merrill*, 136 Fed. 359; *Colman Co. v. Withoft*, 195 Fed. 250.

¹⁴ *In re Inman & Co.*, 175 Fed. 312; *In re Imperial Brewing Co.*, 143 Fed. 579. *Contra*, *In re Pettingill*, 137 Fed. 143. This is doubtless due to the refusal of courts outside bankruptcy to apply the anticipatory breach doctrine to cases where a party has stated nothing but his inability to perform the contract. *Johnston v. Milling*, 16 Q. B. D. 460. Any such limitation upon the doctrine of anticipatory breach, however, seems incorrect, for, provided it is evident that the contract will not be carried out, the question of the ability of the repudiating party to perform should be quite immaterial. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 368.

¹⁵ It is interesting to note that when the question of proving contingent claims was carried to the Supreme Court, proof was denied not merely upon the ground of contingency but that the claim was incapable of liquidation. *Dunbar v. Dunbar*, 190 U. S. 340.

¹⁶ *In re James Dunlap Carpet Co.*, 163 Fed. 541; *In re Caloris Mfg. Co.*, 179 Fed. 722. For a discussion in support of this theory, see 14 COL. L. REV. 158.

¹⁷ § 57 n. "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication. . . ."

seem no force in arguing that where claims become fixed and so liquidated within that time, they are thereby provable, for elsewhere in the present act ample provision has been made for the liquidation of any claims by such means as the bankruptcy court may see fit to employ.¹⁸ Hence these two decisions show a tendency toward the correct result of permitting proof of contingent claims wherever capable of liquidation, which it is to be hoped the courts will finally reach.

DOMICILE OF UNITED STATES SOLDIERS SERVING IN "FEDERAL TERRITORY." — A person *sui juris* can change his domicile only by the concurrence of residence in a place and intention to remain there indefinitely.¹ Intention connotes freedom of choice. Accordingly, prisoners confined under duress cannot acquire domiciles in prison,² nor can paupers in poor-houses.³ Exiles and refugees, on the other hand, can attain new domiciles;⁴ they have freedom of choice, though it is somewhat circumscribed. It would seem, therefore, that a soldier cannot acquire a domicile in the barracks or in any fort or post where he is under compulsion to serve. But a soldier whose rank or duties permit him a choice of several places for his headquarters could establish a domicile in the post he chooses.⁵ It follows that the English rule that a soldier in the service of his sovereign always retains the domicile he had on entering the service, wherever he is stationed,⁶ is too broad. So also the rule, apparently adopted in England, that one entering the military service of a foreign sovereign becomes domiciled in the territory of such sovereign,⁷ should be nothing

¹⁸ § 63, b. "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

¹ Munro v. Monro, 7 Cl. & F. 842; Mitchell v. United States, 21 Wall. (U. S.) 350. The word "indefinitely" is perhaps not sufficiently strong as applied to the English cases, most of which either expressly or inferentially require an intention to remain permanently. Most American courts, on the contrary, seem satisfied with an intention to remain indefinitely. See JACOBS, DOMICIL, §§ 162-174, in which the authorities are collected and commented on. See 3 Beale, CASES ON CONFLICT OF LAWS, 510.

² Barton v. Barton, 74 Ga. 761; Topsham v. Lewiston, 74 Me. 236; Baltimore v. Chester, 53 Vt. 315. See Burton v. Fisher, Milward, 183, 191-192. See DICEY, CONFLICT OF LAWS, 2 ed., 147.

³ Clark v. Robinson, 88 Ill. 498. *Contra*, Sturgeon v. Korte, 34 Oh. St. 525.

⁴ See DICEY, CONFLICT OF LAWS, 2 ed., 147-8; JACOBS, DOMICIL, § 285.

⁵ It is so held in the analogous case of soldiers whose duties do not require them to serve in one post or barracks. See Mooar v. Harvey, 128 Mass. 219; Ames v. Duryea, 6 Lans. 155, aff'd 61 N. Y. 609. It seems that a soldier who retains his rank in the service of his sovereign, though no longer in active service, can get a domicile in the country of another sovereign. See Hodgson v. De Beauchesne, 12 Moo. P. C. 285, 319. A soldier on furlough may acquire a domicile in a place even though he may be called back to service at any time. Attorney-General v. Pottinger, 6 H. & N. 733. But see Craigie v. Lewin, 3 Curt. Eccl. 435.

⁶ Dicey states this rule. DICEY, CONFLICT OF LAWS, 2 ed., 155. It is approved in *Ex parte Cunningham*, 13 Q. B. D. 418, 425.

⁷ Dicey cautiously inserts "probably" into his statement of this rule. DICEY, CONFLICT OF LAWS, 2 ed., 155. It seems to be assumed in *President of United States v. Drummond*, 33 Beav. 449; and is made by counsel *arguendo*, and not contradicted by the court, in *Somerville v. Somerville*, 5 Ves. Jr. 750, 758.